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CASE NUMBER: 1997-SDW-3

In the Matter of:

RAJENDAR KUMAR SINGAL,
Complainant,

vs.

ICF KAISER ENGINEERS, INC.,
Respondent.

Appearances:

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Before: ALEXANDER KARST
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Rajendar Kumar Singal, who was fired by ICF Kaiser Engineers, Inc., (hereafter ICF), brought this action against his former employer, under employee whistleblower protection provisions of the Safe Drinking Water Act, 42 U.S.C.300j-9(i).[1] After the submission of the case but before decision, ICF filed a petition for bankruptcy under Chapter 11 in the United States Bankruptcy Court for the District of Delaware (Case Nos. 00-2263 through 00-2301), which automatically stayed this proceeding. On May 15, 2001, Mr. Singal filed here a *Notice of Stipulation and Order Granting Relief from Automatic Stay Under Bankruptcy Code Section 362(a) and 11 U.S.C. 524*, and a copy of a *Stipulation and Order* of the Delaware Bankruptcy Court which says, *inter alia,* that "the injunction provisions of 11 U.S.C. § 524 are hereby modified solely to permit the Administrative Law Judge in [this case] to issue a decision."

Undisputed facts

ICF operated a quality assurance testing laboratory in Las Vegas, Nevada, which was exclusively engaged in environmental pollution work for the Environmental Protection Agency (EPA) under a QATS (Quality Assurance Technical Support) contract.[2] This contract obligated ICF to monitor the work quality of laboratories around the country which were testing soil and other samples from Superfund cleanup sites. (RX 28.) ICF was to put known contaminants into samples which were then sent by EPA for testing by the laboratories ICF was monitoring, check the findings of the other laboratories to see whether they correctly identified the contaminants ICF put in, and produce audit reports and other documents to be delivered to EPA, which were therefore collectively called "deliverables."[3] The QATS contract also required ICF itself to have a quality assurance officer (QAO) who would monitor the quality of its own work. The claimant Singal was a QAO.

The parties have stipulated that the QATS contract is subject to the Safe Drinking Water Act and other environmental whistleblower statutes, and that Mr. Singal was a covered employee who has standing to bring this action in this forum. To prevail in this case, Mr. Singal must show by preponderance of the evidence that he engaged in legally protected activity, that ICF took adverse action against him, and that his protected activity was a contributing factor in the adverse action taken

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[1]The Las Vegas laboratory was only one component of ICF Kaiser Engineers, Inc., headquartered in Fairfax, Virginia. (RX 28-1.) However, in this decision, unless otherwise noted, the initials ICF will refer only to the Las Vegas laboratory component of ICF Kaiser Engineers, Inc. To avoid confusion, ICF Kaiser International, the corporate parent of ICF Kaiser Engineers, Inc., will be referred to as Kaiser International without the ICF initials.

[2]The phrase "quality assurance" runs through the evidence in this case like a mantra, and most of the abbreviations and acronyms in the case begin with QA.

[3]A deliverable is any completed project that ICF forwards to the EPA. The term includes the audit reports, the samples, and other documents.

against him. *Paynes v. Gulf States Utilities Co.,* ARB No. 98-045, ALJ No.1993-ERA-47 (ARB Aug. 31, 1999).

Dr. Judith Gebhart who was called the QATS Program Manager, was in charge of ICF's QATS program at the Las Vegas laboratory. The organization she headed was in turn divided into auditing, analytical, and administrative groups, each supervised by a Group Leader. The contract required that ICF have a quality assurance officer (QAO) with specified qualifications, whose position could be filled only by a person acceptable to EPA. Mr. Singal, a chemist with a masters degree from a University in India and doctoral work in chemistry at the University of Ontario, was first employed by ICF in the waning days of a previous QATS contract in a position other than QAO. But when the QAO job became vacant, he applied for it and was hired by Dr. Gebhart. He ccupied that position from November 15, 1994, until he was fired by Dr. Gebhart on January 7, 1997. (TR1-285 *et seq*.[4])

Mr. Singal avers that when he became the QAO he was given to understand that he would be independent of Dr. Gebhart and the group leaders; that he came to believe that to ensure high standards of ICF's monitoring process he should review all the deliverables; that he pressed this view within ICF and during a luncheon with Patricia Smith, the EPA official overseeing the QATS contract; that after the Smith lunch, Dr. Gebhart treated him rudely, and the group leaders harassed him; and that Dr. Gebhart eventually fired him. He contends that he was fired for persistently advocating that he be allowed to review all the deliverables, and for the Smith luncheon. His letter of termination signed by Dr. Gebhart made general references to deficiencies in his work "and numerous incidents" and "interactions with co-workers and managers" which Dr. Gebhart deemed unacceptable, but it focused on an incident in November of 1996 when Mr. Singal went on extended leave without telling Dr. Gebhart that he did not complete a paper deliverable called a SOP[5] which was due before his return. (CX 12.)

The basic charter which controlled ICF's contract with EPA is an EPA publication called QA/R-2.[6] (TR1-277-278.) While the QA/R-2 is not in the Code of Federal Regulations, in this case it plays a role analogous to an agency regulation. The QATS contract provided that "[ICF] shall adhere to the EPA-approved QA Program Plan [QAPP] during the contract period of performance. The [QAPP] will be modified as needed during contract performance.... EPA quality assurance policies and standard operating procedures are described in [the QA/R-2]". (RX 28-85.)

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[4]"TR1" will refer to the transcript of the first hearing beginning on November 3-5, 1997, "TR2" will refer to the transcript of the hearing on September 29, 1998 and "TR3" will refer to the transcript for the hearing on March 29, 1999.

[5]SOP stands for Standard Operating Procedures which are detailed explanations provided to the EPA which describe how ICF would perform a given task under the contract. SOPs covered everything from how ICF would clean beakers to how the SOPs would be revised every six months.

[6]More precisely "EPA Requirements for Quality Management Plans QA/R-2 Draft Interim Final of August 1994." (ALJX 1.)

Among other things, the QA/R-2 required ICF to furnish EPA:

> an organization chart that identifies all of the components of the organization and, *in particular*, the organizational position of the [QAO] that *documents the independence of the [QAO] from groups generating environmental data*;
>
> a discussion of the responsibilities and authorities of the [QAO] and any other QA staff, including the *line of reporting to senior management*.

(ALJX 1-7.)

The QAPP, which was drafted and periodically updated by ICF and filed with EPA, described the QAO's "responsibilities and authorities" as follows:

> The [QAO] is responsible for the implementing and monitoring the ICF QATS QA program. The *QAO reports directly to corporate management , that is represented by the ICF EEGQAM* [Environment and Energy Group Quality Assurance Manager]. *He maintains formal lines of communication with the Program Manager*, the Group Leaders, and the rest of the ICF QATS staff. *He assists the EEGQAM* in monitoring the implementation and effectiveness of the corporate quality program within the ICF QATS Laboratory.

(CX 8:2-3.) (Emphasis added).

In its first exhibit (RX 1-2), ICF offered its organization chart. However, Mr. Singal offered a different organization chart which ICF admittedly filed in 1995 and 1996 with its periodic QAPPs. (CX 8-4,5.) When questioned by me about the two organization charts which appeared to depict Mr. Singal's organizational position inconsistently, ICF's counsel explained that the chart it introduced was an "internal document." (TR2-9.) The pertinent parts of both charts are reproduced in Appendix A where one is labeled "internal" as characterized by ICF, and to differentiate them, the other is called "public".

Construction of Contract Language and Organization Charts

In construing the above quoted QAPP language, I take it that in business parlance a person is the direct subordinate of whoever he reports to, and I construe the phrase "reports directly to" to be the equivalent of "works for." I further take the phrase "formal lines of communication" to mean communication between persons independent of one another who may choose to communicate by memoranda or other formal means, as distinguished from the conventional ways a subordinate communicates with his supervisor. Whatever else that awkward and ambiguous phrase may mean, I have concluded that in this context it was clearly intended to convey that persons with whom the QAO

was to have only "formal lines of communications," were to be distinguished and contrasted with those he worked for, who controlled or supervised him, or wrote his evaluations.

A scrutiny of the two organizational charts in Appendix A reveals three notable differences which are pertinent here: 1) the internal chart shows Mr. Singal as a subordinate of Dr. Gebhart, while the public chart depicts him as a subordinate of Yvonne Fernandez; 2) the internal chart (unlike the public one) has no distinct "reporting" lines which are contrasted with "formal communication" lines; and 3) the internal chart does not show Ms. Fernandez or her position at all.

My reading of the public chart, in conjunction with the description of "responsibilities and authorities" of the QAO in the QAPP quoted above, leads me to the conclusion that ICF formally and repeatedly represented to the EPA that the ICF quality assurance program required by the QA/R-2 was the responsibility of Yvonne Fernandez, high Kaiser group manager who worked at the Las Vegas laboratory only part time, but that Ms. Fernandez had a full-time on-site assistant at the Las Vegas laboratory, Mr. Singal. I read the public chart and the QAPP language to be saying that Mr. Singal was a direct subordinate of Ms. Fernandez, and that he was *not* reporting to, working for, or was a subordinate of Dr. Gebhart. I further find that ICF represented that both Ms. Fernandez and Mr. Singal, while employed by the Kaiser group of companies, were both independent watchdogs whose duty was to ensure that ICF followed the QA program; and that both Ms. Fernandez and Mr. Singal were outside the group run by Dr. Gebhart, and outside the ambit of her authority, but answerable to, and directly reporting to senior management in the Kaiser hierarchy.

QAO's actual independence from Dr. Gebhart

Dr. Gebhart testified that she was a vice-president of ICF in charge of the QATS project in Las Vegas, and that she hired, supervised, evaluated, fired and otherwise treated the QAO as her direct subordinate, because in fact he was her direct subordinate. She said that Ms. Fernandez was only an adviser to both her and to Mr. Singal. (TR1-286.)

Ms. Fernandez testified that she was a vice-president and Director of Quality at Kaiser International (ICF's parent), that she worked in the corporate headquarters in Fairfax, Virginia, and that she was the "top quality person within the Kaiser organization" with responsibility for ICF, among others. (TR1-431.) She said that Mr. Singal "worked for" Dr. Gebhart, and that she (Fernandez) had nothing to do with Mr. Singal's hiring as QAO, his supervision, promotions, or eventual firing. Although she knew that at some point that Dr.Gebhart was disappointed in Mr. Singal, she did not know that he was fired until after the event, and she was not consulted about it ahead of time. (TR1, pp. 472, 473, 479.) Ms. Fernandez testified that "...the decision... of whether [Mr. Singal] continued employed or not or whether he was the QA Officer or not was solely [Dr. Gebhart's]. So it was, to a certain degree, not relevant to me." [sic] TR1-482. Ms. Fernandez never met Mr. Singal prior to trial, although she seems to have had a few telephone contacts with him, and read some of his reports. (TR2-437.) She said that prior to Mr. Singal's departure she did not know that there were any quality assurance problems at ICF,

but that after Mr. Singal was fired, she came to Las Vegas to do an audit and was surprised to discover that there were no records of prior audits by Mr. Singal. (TR1-473.) Although Mr. Singal addressed a memorandum to her arguing that he should review all deliverables, Ms. Fernandez was unaware that he persistently advocated that to Dr. Gebhart, or that he had a running dispute with Dr. Gebhart about the 100% review. (TR1- 484-5.) She testified that she spoke with Dr. Gebhart three times about Mr. Singal, but did not intervene because Dr. Gebhart did not ask her to intervene. (TR1- 369.) Ms. Fernandez described her own role at ICF as a resource and an arbiter, and said that she offered no opinions to Dr. Gebhart unless asked. She said that Dr. Gebhart was responsible for quality assurance at ICF. (TR1-484.)

Consistently with the testimony of its lead witnesses, ICF unabashedly takes the position here that Mr. Singal was Dr.Gebhart's agent whom she could and did hire, direct, supervise, and fire on her own authority. (TR2-26.) Thus I find that at all times pertinent here, Ms. Fernandez, Dr. Gebhart, and ICF treated Mr. Singal as if he were the direct subordinate of Dr.Gebhart, not of Ms. Fernandez.

ICF's misrepresentation to EPA of the QAO's independent status

ICF argues that it had leeway in how to comply with the QA/R-2 requirement of an independent QAO, provided he was independent of persons generating environment data. However, I have concluded that while that may have been true somewhere along the line, ICF elected to satisfy the independent QAO requirement by representing to the EPA that "monitoring the implementation and effectiveness of the... quality [assurance] program withing the ICF QATS Laboratory" was being done by Ms. Fernandez and her full-time on-site assistant, Mr. Singal, who was "reporting directly to" her. To demonstrate just how independent Mr. Singal was of the Las Vegas laboratory group run by Dr. Gebhart, ICF repeatedly filed with EPA its public organization chart and the QAPPs containing the above quoted language. Thus it appears that ICF periodically reassured the EPA that Mr. Singal was so independent of Dr.Gebhart and her group that he maintained only "formal lines of communication" to them. The plain meaning of those representations was that Mr. Singal's relationship with Dr. Gebhart was such that he did not even have to talk her – only send her formal memoranda or copies of reports. The unmistakable implication is that Mr. Singal was not Dr. Gebhart's subordinate, and that she had no control over him or his career.

ICF attempts to explain any disparity between its representations to EPA and reality as being due to confusing language in the QAPP which ICF itself admittedly drafted. It makes these points: 1) the QATS contract trumps the QAPP, and the contract pay grade tables show that Dr.Gebhart was Mr. Singal's boss because they list the Program Manager at professional level 4, and the QAO as Professional Level 3[7]; (TR2-5, 24, 28,33, 55; RX 28:129-135); 2) the Program Manager was

[7]The QATS contract contains "personnel definitions, labor classifications, duties and qualifications" of ICF's employees, who are divided into four professional levels. RX 28-129 et seq. The program manager is the sole person in level 4. (TR2-21 *et seq.*) Professional level 3 begins with the sentence "Under general supervision of

responsible for supervising the entire QATS staff which necessarily included the QAO; (TR2-21); 3) EPA knew how ICF was actually being run, did not object, and declined to participate in this action; 4) Dr.Gebhart was not part of but above the groups generating environmental data mentioned in the QA/R-2, and thus Mr. Singal's reporting to Dr.Gebhart did not violate QA/R-2's mandate that he be independent from groups generating environmental data. (TR2-5); 5) "it defies all logic for Kaiser to say that the quality assurance officer has got to report to Yvonne Fernandez" because she was far away in Virginia and too busy with her work with 50 or 60 others doing quality assurance work; (TR2-28); and 6) nothing required ICF to have an official such as Ms. Fernandez to whom Mr. Singal could report, and "[m]any companies don't have Yvonne Fernandez's position." (TR2-23.)

These arguments are not persuasive. The QAPP is not trumped by the QATS contract but is a part and parcel of it because it says that ICF "shall adhere to the EPA-approved [QAPP] during the contract period of performance." (RX 28:85.) Regardless whether it defies logic, ICF did represent to the EPA that Mr. Singal "reports directly to corporate management, that is represented by [Ms. Fernandez]," and "*assists* [her] in monitoring the implementation and effectiveness of the corporate quality program within the ICF QATS Laboratory." (CX 8-3.) That sentence plainly means that Ms. Fernandez monitors the implementation and effectiveness of the corporate quality assistance program at ICF, and that Mr. Singal assists her in performing her duties. The evidence here does not demonstrate that it was inherently impossible for Ms. Fernandez to play a supervisory role over 50 or 60 QAOs, and there is no evidence that EPA was told or knew how many other QAOs she was overseeing. What is more, if it was impossible for Ms. Fernandez to supervise Mr. Singal, it merely shows that ICF's representations on the public chart and the QAPP were all the more deceptive.

ICF is of course correct in arguing that the intent of the QA/R-2 and the QAPP was to give the QAO independence only from those persons or groups who were generating environmental data, but not from higher Kaiser executives who were presumably more high minded and less likely to be swayed by parochial self interest. The QA/R-2 said so in effect. But I infer that the plain intent of the QAPP was to equate those who generated environmental data with those to whom the QAO was to have only "formal lines of communication." Since Dr. Gebhart was the principal person with whom Mr. Singal was said to have only "formal lines of communication," the QAPP thereby acknowledged that Dr. Gebhart was *ipso facto* the principal generator of environmental data. Thus I find no merit in ICF's contention that Dr.Gebhart was not generating environmental data. Implicit in ICF's argument is that only the group

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project leader, plans, conducts and supervises assignments...."and goes on to list group leaders, the QAO and senior chemists and auditors. (RX 28-131 *et seq.*) ICF argues that this means that all Level 3 employees, including the QAO, were direct subordinates of Dr. Gebhart. I do not find the "general supervision" reference to be so clear. One can construe this general reference to merely mean that the QAO was an ICF employee who was under the administrative supervision of the project leader in the sense that he had to work certain hours, and be subject to ICF's personnel policies, etc. In any event, I do not find that this general reference overrides the independence requirements of the QA/R-2 and the very clear and specific representations in the QAPP which depicts the QAO as an employee directly reporting to senior corporate management represented by a vice-president of the parent Kaiser International, Ms. Fernandez, and maintains only formal lines of communication with Dr. Gebhart.

leaders and their subordinates were generating such data. But the facts presented here and both organization charts show that Dr. Gebhart was in direct charge of the group whose principal, if not sole function, was generating environmental data. To say that the manager of the group which was generating environmental data was herself not producing what her group was producing, strikes me as disingenuous at best. Indeed, yet another (untitled) chart put in evidence by ICF as RX 1-5, which is also reproduced in Appendix A and (for want of a better title) is labeled the "EPA– ICF relationship chart," appears to lump Dr. Gebhart, and the task leaders into one group — roughly the same group with which Mr. Singal was supposed to have only "formal lines of communication" — and depicts how that group relates to the EPA officials. The chart also appears to graphically illustrate how the project manager and her task leaders are supported by others who look after health and safety, legal issues, and significantly *quality control*. What strikes me as most important about this chart is that it yet again appears to place the quality assurance function beyond the control of Dr. Gebhart.[8]

It should also be noted that Dr.Gebhart was not part of the "corporate management" in the sense used in the QAPP which announced that "the QAO reports directly to corporate management, that is represented by the ICF EEGQAM [Ms. Fernandez]." Dr. Gebhart was a vice-president of ICF as distinguished from Ms. Fernandez who was a vice-president of the parent Kaiser International. The designation of Ms. Fernandez on the chart as "ICF Kaiser Environmental and Energy Group Quality Assurance Manager", and no lines connecting her with Dr. Gebhart, make it quite clear that she is outside and above the Las Vegas group run by Dr. Gebhart. I take "corporate management" to mean senior corporate management in the Kaiser group of companies equal to or above the corporate rank of Ms. Fernandez. Reading it otherwise would lead to the nonsensical conclusion that Kaiser International vice-president Fernandez was "representing" the QATS program manager who was only one of the vice-presidents of the ICF subsidiary in charge of only the Las Vegas contract work.

On the basis of the foregoing, I infer and find that ICF clearly understood that the QA/R-2 and the QATS contract required that Mr. Singal – notably – be independent from whoever at ICF was generating environmental data, which included Dr. Gebhart. I also draw the inference that the placement of Ms. Fernandez on the public chart, but no mention of her in the internal chart, and the portrayal of Mr. Singal as Ms. Fernandez's deputy who was *not* reporting to Dr. Gebhart, and underscoring that Mr. Singal had only "formal lines of communication" to Dr. Gebhart and her lieutenants, was a representation carefully tailored to comply with the QA/R-2 requirement that the QA work at ICF be done by personnel independent of and outside Dr. Gebhart's group.

There is circumstantial evidence that the EPA understood what ICF was telling it, i.e. that Mr.

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[8]ICF's counsel's not entirely satisfactory explanation of the significance and meaning of this chart is at TR2-30. I also note that there was testimony that Mr. Singal had the power to stop ICF's work under some hypothetical circumstances, but that to do that he had to contact Ms. Fernandez who could overrule him. (TR1-31-318.) That strikes me as inconsistent with the notion that he was an agent under the control of Dr. Gebhart, for if that were so, she, not Ms. Fernandez, could overrule him.

Singal was a subordinate of Ms. Fernandez, not of Dr. Gebhart; and that ICF knew that was EPA's assumption. I glean that from the SOPs and their handling. These SOPs required the signatures of various government and ICF personnel, the QAO among them. (CX 11). The line for the QAO's signature in the SOPS bear the signatures of either Mr. Singal or Ms. Fernandez. Other evidence indicated that when Mr. Singal went on his extended leave which preceded his firing, ICF had to scurry to obtain Ms. Fernandez's signature in the place of Mr. Singal's. The fact that when he was unavailable, the SOP had to be signed by Ms. Fernandez, is an indication that as far as the EPA was concerned Mr. Singal was the agent, deputy, or assistant of Ms. Fernandez, not Dr. Gebhart. If Mr. Singal was Dr. Gebhart's agent, she could have signed in his stead. I also note that the QAPPs required only two signatures on their face page, the Program Manager's and the "Senior Qaulity Assurance Officer" which Mr. Singal signed. (CX 8-1.) If the QAO were merely the agent of the Program Manager, as ICF argues here, it would have been redundant and illogical to also require the QAO's signature.

Management practices at ICF undercut its argument that although it treated Mr. Singal as the subordinate of Dr. Gebhart, it nevertheless complied with the spirit of the independence requirement by ensuring that Mr. Singal was independent of the group leaders and lower staff who were generating environmental data. While there was testimony that Mr. Singal was the peer of the group leaders because they were all at professional level 3, his pay was just a little over half of the group leaders'. But more significantly, Dr. Gebhart testified that before she made out Mr. Singal's periodic performance appraisals, she customarily invited the group leaders to advise her how *they* evaluated Mr. Singal. Mr. Kell, one of the group leaders, testified that his annual "input" to Dr. Gebhart about Mr. Singal's performance "certainly wasn't praise." (TR1-540.[9]) It is clear to me that by soliciting the group leaders' appraisal of Mr. Singal as part of doing her evaluations of him, Dr. Gebhart gave the group leaders an opportunity to influence how she evaluated Mr. Singal. Since Dr. Gebhart's evaluations presumably determined his pay, promotion, etc., Mr. Singal, who knew all this, was put in a position of having to be concerned about incurring the displeasure of the group leaders, lest they criticize him to Dr. Gebhart and thus prejudice his career which was entirely in Dr. Gebhart's hands. Indeed, Dr. Gebhart's termination notice appears to confirm that one of the factors which led her to fire Mr. Singal, was his presumably unsatisfactory "interaction with co-workers and managers in this office." (CX 12.) Implicit in that is the notion that Dr. Gebhart viewed Mr. Singal as someone who was expected to go along with the group leaders, and who incurred the criticism of the group leaders at some peril to his career. I read the termination notice as implying that in firing him, Dr. Gebhart considered how he got along with the group leaders (i.e. "managers"), and as implying that Dr. Gebhart even expected Mr. Singal not to ruffle the feathers of the lower staff (i.e. his "co-workers"). Thus I find that contrary to ICF's argument here, Mr. Singal was deprived of independence from the group leaders and the staff who were all admittedly generating environmental data.

It is my finding that ICF's explicit assurances to the EPA and the public that its work was being scrutinized by a two person QAO team which had organizational and effective independence from whoever

[9]It should be noted that when Dr. Gebhart handed Mr. Singal his letter of termination, she had Mr. Kell escort him from ICF premises.

was generating environmental data was a sham. In fact ICF was organized and run as depicted on its internal organization chart. I assume ICF called this chart internal because it was not intended for public use. Which is to say that the ostensible QA function of Ms. Fernandez in the Las Vegas lab was almost entirely a window dressing for public consumption only. While Ms. Fernandez was publicly represented to be the principal official in charge of the quality assurance program in the Las Vegas laboratory, and was ostensibly doing her work with the assistance of her on-site deputy Mr. Singal, in fact Ms. Fernandez remained in Virginia, played virtually no role in quality assurance work at Las Vegas, and admittedly left Dr. Gebhart in control of Mr. Singal and the QA tasks at Las Vegas. Ms. Fernandez admittedly subscribed to the notion that Mr. Singal was Dr. Gebhart's assistant, not her own. Indeed she said she felt that Dr. Gebhart, not she (Fernandez) or Mr. Singal, was the overseer of the quality assurance function in Las Vegas. Apparently the first time Ms. Fernadez really acted as a "hands on" QA officer at Las Vegas during the life of this QATS contract was when she came down to Las Vegas to do an audit after Mr. Singal's departure. In short, Ms. Fernandez abdicated to Dr. Gebhart her ostensible responsibility as the main QA watchdog of ICF and the direct superior of Mr. Singal. With Ms. Fernandez's approval, Dr. Gebhart hired the person who was publicly represented to be Ms. Fernandez's assistant and the independent on-site quality assurance watchdog, and expected him to be her lapdog instead. While ICF was formally representing to EPA that Mr. Singal was maintaining only "formal communications" with Dr. Gebhart, in fact, Dr. Gebhart told Mr. Singal what to do and how to do it, kept him on a meager salary, and hinted to him that his pay increases or promotions were conditioned on his conforming to her conception of his role, and eventually fired him when she concluded that he would not conform. Mr. Singal was expected to report directly *not* to corporate management (as per QAPP), but to Dr. Gebhart, and only occasionally communicate with Ms. Fernandez by formal written reports. In effect, ICF turned its advertised quality assurance program on its head. Rather than having an independent Mr. Singal report to Ms. Fernandez and to corporate mangers above her, and maintain only "formal lines of communication" to Dr. Gebhart and her subordinates, ICF put Mr. Singal under Dr. Gebhart's direct control and allowed him only formal lines of communications to Ms. Fernandez.

Waiver of the QAO's independent status by EPA

ICF's argument that it should not be bound by its QAPP representations to EPA is without merit. These representations became part of the contract when EPA approved the QAPPs, and thus ICF became bound by them. But in the last analysis, even if ICF were not held to what it promised in the QAPPs, the QA/R-2 itself mandated that Mr. Singal have organizational and real independence of Dr. Gebhart, the group leaders and the staff. He was clearly not given that independence.

ICF argues that EPA in effect waived Mr. Singal's independence by knowing that he had none, and condoning it by failing to object, or by declining to join or support Mr. Singal in this action. There is no evidence before me that at least prior to the Smith-Singal luncheon, EPA did know what ICF was really doing with Mr. Singal.[10] But even if EPA knew the real situation, it appears to me that a government agency

[10]I am mindful of ICF's counsel comment that the "internal [chart] was reviewed and approved by the EPA." (TR2-9.) When asked whether there was any evidence it was reviewed and approved by the EPA, he offered to have

does not waive a government contractor's statutory or contractual obligation because a low ranking government official tolerates violations.

The record does not disclose why EPA did not participate in this action, but its refusal to authorize Ms. Smith to testify here was apparently due to an internal agency housekeeping rule. In any event, neither EPA's non-appearance in this action as a party or its declining to send a witness, supports the conclusion that the EPA was knowingly inclined to wink at ICF denial of independence to the QAO.

Advocacy of 100% review of deliverables as a factor in decision to fire claimant

It is admitted and I find that Mr. Singal repeatedly urged Dr. Gebhart to let him review all the deliverables. (TR1-347.) Implicit in his advocacy of a 100% review was the notion that a review of only a portion of the deliverables, which was what Dr. Gebhart wanted, was inadequate to best assure quality. He also urged the 100% review in a formal memorandum to Ms. Fernandez with a copy to Dr. Gebhart. (RX 3-38.) He received no reply from Ms. Fernandez, and only a reproach from Dr. Gebhart for what she termed his confusing contract requirements with his personal preferences. (TR1-396.) Dr. Gebhart testified that she felt he should review about 20% of the deliverables, which she said was the industry standard, and devote more of his time to other tasks. (TR1-396.) She admitted that the issue of 100% review was a basic disagreement between them, and that this running dispute over this fundamental issue exasperated her. (TR1-391.) The record as a whole shows that this festering conflict was the genesis of most of her frustrations with Mr. Singal, which led her to fire him. She essentially admitted it, and I find on the basis of the whole record, that she fired him not so much because she thought he was incompetent (her last periodic evaluation of him suggested otherwise), and nor merely because he went on vacation without telling her he did not complete a SOP assignment, but principally on account of his conception of his job which was at odds with her own and the group leaders' views of what his role should be. While ICF contends that all Dr. Gebhart and the group leaders wanted was effective performance from Mr. Singal, I

Dr. Gebhart testify presumably to substantiate what he said. (TR2-10.) Because there was an objection to Dr. Gebhart testifying at the second hearing which was called to have a colloquy with counsel, not for presentation of evidence, the offer of Dr. Gebhart's testimony was declined. As the record stands, there is no evidence that the EPA was aware that ICF had or used an organization chart which was different from the public chart ICF was filing with EPA. I cannot treat comment of counsel as evidence. But more importantly I am skeptical of the notion that ICF would be repeatedly filing its QAPPs with charts showing Mr. Singal outside Dr. Gebhart's control, while at the same time seeking EPA review and approval of the internal chart which contradicts the public chart by showing Mr. Singal under her direct control. It is noteworthy that the stated reason in the QA/R-2 for requiring the periodic filing of organization charts in the first place was to show "*...in particular*, the organizational position of the [QAO/Singal] that documents [his] independence... from groups generating environmental data." (ALJX 1-7.) (Emphasis supplied). The contention that EPA reviewed and approved the internal chart showing no independent QAO, while at the same also accepting and approving the contradictory public chart, is, in effect, a charge that EPA was either hopelessly incompetent, or colluded with ICF in a sham to deceive the rest of the government and the public about how quality assurance functions at ICF and its oversight by EPA was conducted. In either event, that implicit charge of EPA malfeasance, even if supported by plausible evidence, would be irrelevant here and beyond the purview of this action, and would not excuse ICF's conduct.

find that they really wanted to dictate to him how he was to monitor their work. I find that his persistent suggestions and advocacy of the 100% review was at least a contributing factor in his firing.

Mr. Singal's conduct was legally protected

In the Ninth Circuit where this case arose, internal complaints to management in the form of suggestions "touching on" environmental quality assurance issues, are protected activities under the whistle blowing statutes. *Helmstetter v. Pacific Gas and Electric Co.,* SWD-2 (Sec'y Sept. 9, 1992); *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). Thus I conclude that Mr. Singal's internal advocacy of his review of 100% deliverables was protected conduct. I agree with Mr. Singal that his position as a quality assurance officer was analogous to that of the inspector in the leading case of *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). I am not persuaded by ICF's argument that *Mackowiak* is distinguishable because unlike here the safety regulations at issue there were detailed and published. While the regulations which inspector Mackowiak had to apply may have been detailed, the regulation which required that he have independence says pretty much what QA/R-2 here says only more succinctly.[11] They both basically require two things: independence of the inspector/QAO, and his direct line of communication to senior management. That QA/R-2 is not published in the CFR is not significant given the QA/R-2 is incorporated in the QATS contract by reference, and given that ICF concedes that the QA/R-2 is binding upon it in any event. Thus I find that Mr. Singal's firing, in part for advocating 100% review, which is to say for making internal complaints about matters touching on quality assurance issues, was a violation of the whistleblower statute.[12] And, in my view, the firing of him by Dr. Gebhart, who was represented to the public as having no authority to intrude on Mr. Singal's independence, makes the violation egregious.

ICF's argument that if Mr. Singal believed he was independent he should have protested when it became apparent that Dr. Gebhart was asserting control over him, has been considered. But I find no

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[11]The *Mackowiak* regulation said:

> The persons and organizations performing quality assurance functions shall have sufficient authority and *organizational freedom* to identify quality problems, to initiate, recommend or provide solutions; and to verify implementation of solutions. Such persons and organizations performing quality assurance shall *report to a management level* such that *independence* from cost and schedule when opposed to safety considerations are provided....

10 C.F.R. Part 50, Appendix B. (Emphasis supplied).

QA/R-2 required that the QAO have '*independence from groups generating environmental data*" and have a direct "*line of reporting to senior management*." (ALJX 1-7.) (Emphasis supplied).

[12]Since this would be true even if Mr. Singal's complaints were wrong headed, it need not be decided here whether Mr. Singal was right, or that 20% review was adequate to ensure quality. *Minard v. Nerco Delamar Co.*, 92 (Sec'y Jan. 12, 1995), slip op. at 8.

authority, and ICF cites none, for the proposition that an employee in the position of the inspector in *Mackowiak* or Mr. Singal here, must object to infringements on his independence or lose it. Watchdogs are given independence to ensure they can perform their duties without fear of those they are watching, and they cannot be said to have waived it because they did not insist on it for fear of reprisal.

The Smith-Singal luncheon as a factor in decision to fire claimant

The evidence pertinent to Mr. Singal's alleged complaints to the EPA (as distinguished from his internal complaints at ICF) is as follows. Mr. Singal was sent to an EPA training conference in Houston in March 1995. He testified that the EPA Director told the conference that quality assurance people were expected to report to EPA if they ran into trouble with their employer in doing their jobs. (TR1-38.) The QATS contract itself says that among his duties, the QAO "interacts with EPA QATS QAPP Officer [Ms. Smith] to ensure program continuity" (RX 28:133.) Ms. Smith was at that conference, and she met and socialized with Mr. Singal. (TR1-366.) During a luncheon with Ms. Smith in August 1996, Mr. Singal complained about his salary being too low, and that he was not allowed to review all the deliverables. ICF argues that Mr. Singal was merely airing personal complaints with Ms. Smith and that this meeting should not be protected conduct. I disagree because I find that he touched on topics that involved performance under the QATS contract, namely deliverables going out without his review. *See, e.g. See Nathaniel v. Westinghouse Hanford Co., 91-SWD-2 (Secy Feb. 1, 1995), slip op. at 8-9* (noting that a complainant need only touch on subjects regulated by the pertinent environmental statutes). While the record is not entirely clear on this point, there is circumstantial evidence which I credit, that Mr. Singal told Ms. Smith that unless he reviewed all deliverables, the group leaders would, in effect, be deciding which 20% of deliverables he could review. He felt that the group leaders should not be handpicking which deliverables he should scrutinize if he was to faithfully perform his QAO duties.

Dr. Gebhart testified that in her view it was inappropriate for Mr. Singal to tell the EPA about his concerns about how many deliverables he was allowed to review. She said that she was ultimately responsible for the quality assurance program under the QATS contract, and that the EPA was not concerned about what percentage of deliverables was reviewed by the QAO, but merely required a quality product. (TR1-393.) I infer from her testimony that she would have been displeased if she knew that Mr. Singal complained to Ms. Smith that he was having trouble doing his job because he could not review all the deliverables. Thus I turn to the question whether she did know it.

Dr. Gebhart testified that she thought that Mr. Singal's lunch conversation with Ms. Smith was entirely social, that she knew he complained about his low pay, but did not know before she fired him that he complained to Ms. Smith about any restrictions on his quality assurance role or the 100% review. But there is considerable circumstantial evidence which suggests that Dr. Gebhart learned what Mr. Singal told Ms. Smith soon after the lunch and before she fired him. While there is conflict in the testimony, on balance, I find Mr. Singal's testimony and those of his co-workers who corroborated him, more credible on this point than the testimony of Dr. Gebhart and the other ICF's witnesses. I credit the evidence that at least one of the group leaders, Mr. Kell, and others at ICF, made comments to Mr.

Singal which amounted to questioning him how he could continue at ICF after his lunch with Ms. Smith. Implicit in it is the notion that they thought that Mr. Singal "snitched" to EPA about internal ICF disputes and problems. Thomas Melville, who worked for ICF until January 1997 when he went to work for the Las Vegas Police, testified that Mr. Kell told him about the Smith-Singal lunch in a casual conversation during a smoking break and that Mr. Kell "was like angry, like perturbed that [the lunch] would happen." (CX 16:7.) I credit this deposition testimony because it seems inherently plausible and because Mr. Melville was one of the few witnesses who was no longer employed by ICF when he testified, and had no stake in its outcome. I credit this testimony over that of Mr. Kell, who along with the other two group leaders seemed hostile to Mr. Singal at trial. In evaluating Mr. Kell's credibility and his hostility to Mr. Singal, I have taken into account that Dr. Gebhart had invited Mr. Kell to be in her office when she handed Mr. Singal the termination notice, (TR1-66), and that she asked Mr. Kell to escort Mr. Singal out of the building after she handed him his notice of firing.

On balance, I find that because the group leaders to whom Dr. Gebhart was close, and others, knew the substance of the Smith-Singal lunch conversations, I infer that Dr. Gebhart knew it too before she fired him; that this conversation touched on Mr. Singal's inability to persuade ICF to let him do 100% review of deliverables and was therefore protected conduct; and that Dr. Gebhart thought such complaints to EPA were inappropriate. I also draw the inference that the conversation with Ms. Smith was one of the factors which led Dr. Gebhart to fire him.

Dual Motive for Firing

Because ICF argues that it had other legitimate reasons for firing Mr. Singal (e.g. the SOP incident), I have subjected this case to the so called "dual motive" analysis. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977). Under that analysis, if there is a showing that protected activity played a role in the employer's decision to terminate, the employer has the burden to show that it would have fired the employee even in the absence of the protected activity. But, if the legal and illegal motives cannot be separated, the employee prevails. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 at 1164 (9th Cir. 1984). I have concluded that ICF failed to separate legitimate motives it may have had for wanting to fire Mr. Singal from discriminatory ones. Dr. Gebhart's testimony, crucial because it was she who fired him without consulting anyone else, was to the effect that her reasons were several. But she acknowledged that his pestering her about the 100% deliverable review issue was one of her reasons. She did not testify that in the absence of that, she would have fired him anyway, and I infer from what she said that she probably would not have fired him. In any event, I find that ICF did not carry its burden to separate any legitimate motive for firing Mr. Singal, from illegitimate ones.

Damages

The remedies available to a prevailing whistleblower listed in the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300j-9(i)(2)(B)(ii), include reinstatement, back pay, compensatory damages, and where appropriate, exemplary damages. Mr. Singal seeks lost back pay; lost past medical and retirement benefits; prejudgment interest; medical expenses; compensatory damages for emotional distress and loss of reputation and injury to career; lost future medical and retirement benefits; and exemplary damages.

Back Pay

Mr. Singal seeks back pay at the rate of $65,000 a year, although his annual salary at the time he was fired was only $36,000. Dr. Gebhart testified that the QAO who succeeded Mr. Singal earned $65,000 per year, but said that was because he was hired as a Scientist IV (Mr. Singal was a Scientist III), had a Ph.D., and had QAO experience in a similar laboratory setting. (TR3-211, 220.) Mr. Singal views this as an admission that his salary and job title were too low given the authority and independence his job called for.

Since Mr. Singal freely accepted Dr. Gebhart's offer of $36,000 when he hired on as the QAO, I find that he is entitled to back pay at his actual salary rate from his termination to November 14, 1999, the expiration date of the QATS contract, for a total of $103,154. In making this calculation I award him 51 weeks of wages in 1997 (he was terminated January 7, 1997), 52 weeks in 1998, and 48 weeks in 1999 (through November 14, 1999).

Although the SDWA's employee protection provision does not explicitly require victims of employment discrimination to attempt to mitigate damages, cases have consistently imposed such a requirement, in keeping with the general common law rule of "avoidable consequences" and the parallel body of law developed under other anti-discrimination statutes. However, the respondent bears the burden of proving that the complainant did not properly mitigate. *See, e.g., Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001) at 18; *Jones v. EG & G Defense Materials, Inc*., ARB No. 97- 129, ALJ No. 1995-CAA-3 (ARB Sept. 29, 1998). To meet this burden, the respondent must show that there were substantially equivalent positions available, and the complainant failed to use reasonable diligence in seeking these positions. *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5, slip op. at 15 (ARB Mar. 29, 2000); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983).

ICF contends Mr. Singal failed to mitigate, but its only evidence was Dr. Gebhart's testimony that, as a member of the American Chemical Society, Mr. Singal was entitled to have 18 free "position wanted" advertisements per year appearing in the *Chemical Engineering News*. On cross-examination Mr. Singal admitted he did not register with a job placement agency, place a free "position wanted" advertisement in the *Chemical Engineering News*, or go to business sites to fill out job applications in person.

A complainant is only required to make reasonable efforts to mitigate damages, and is not held to the highest standards of diligence. The complainant's burden is not heavy, and does not require him to be successful in mitigation. The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual characteristics of the claimant and the job market. *Rasimas* at 624. Mr. Singal offered numerous cover letters that he mailed in response to advertisements appearing in newspapers, on the Internet, and in the *Chemical Engineering News.* He testified that he applied for over 100 positions from January 20, 1997 to March 27, 1999. He also applied for positions in many states other than Nevada, as well as positions in Saudi Arabia. Although he did not register with job placement agencies, he testified that he mailed resumes to them for consideration for specific jobs. The only work he was able to secure was a temporary and part-time job teaching one chemistry lab class for three months at a community college, where he earned a total of $2,200. (TR1-565.) I find that Mr. Singal has put forth a diligent effort in seeking employment, and I find that he made reasonable efforts to mitigate his damages. I subtract the $2,200 he earned from the $103,154 back pay he is entitled to, leaving a net award of $100, 954.[13]

Lost Past Medical and Retirement Benefits

The SDWA provision that an injured complainant is entitled to reinstatement to his former position together with the "terms, conditions, and privileges of his employment" has been held to require the restoration of employee benefits, which include health, pension, and other related benefits. *See Hobby, supra* at 35; *Creekmore v. ABB Power Sys. Energy Servs., Inc*., No. 93 ERA-24 (Dep. Sec'y Feb. 14, 1996). Thus, ICF is required to pay medical expenses which Mr. Singal incurred because of the termination of his health benefits, including premiums for family medical coverage while he was seeking new employment. I accept Mr. Singal's credible testimony that he expended $13,376 for past medical benefits. Additionally I find that he would have continued to pay premiums for medical coverage at the rate of $741 per month through November 14, 1999. Therefore, I award him $19,240 for the cost of past medical benefits.

Mr. Singal also requests an award for past lost retirement benefits consisting of Social Security and 401K benefits. These benefits were terms, conditions and privileges of his ICF employment, and he is clearly entitled to be reimbursed for these losses as part of the SWDA's "make whole" remedy. *See Hobby, supra*, at 35. However, Mr. Singal provided no evidence on the basis of which these items could be calculated. His brief on damages requested that the actual amount of loss under this category be determined by the parties. Thus this order can only declare in general that Mr. Singal is entitled to this species of damages from the date he was fired until November 14, 1999, and leave it to the parties

[13]For purposes of computing and compounding interest, interim earnings are credited against gross back pay during the quarter in which the interim earnings were earned. *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), slip op. at 42. As there is no evidence when Mr. Singal earned the $2,200, I calculate the interest on an assumption most favorable to ICF by crediting these earnings against his back pay in the first quarter following his termination.

to calculate the amounts.

Prejudgment Interest

Doyle v. Hydro Nuclear Servs., ARB Nos. 99-041, 042 & 00-012, ALJ No. 89-ERA-22 (ARB May 17, 2000), held that quarterly compounded prejudgment interest on back pay was appropriate under the employee protection provisions of federal statutes, and provided detailed guidance on how such interest should be calculated. Mr. Singal is awarded prejudgment interest on his back wages calculated per the *Doyle* instructions. Because he would have enjoyed the use of monies he was forced to expend to maintain his health care benefits but for his illegal termination, he is also awarded interest on these medical costs as well. He is awarded $85,750 in prejudgment interest. The calculations are set out in Appendix B.

Reinstatement or Front Pay

Reinstatement to his former position to which Mr. Singal would normally be entitled, is impractical now that ICF has sold the Las Vegas laboratory. Furthermore, the QATS contract would have expired by its own terms on November 14, 1999, perhaps leaving Mr. Singal without employment after that date if the EPA did not renew the QATS contract. *See Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991). Mr. Singal's last brief concedes that reinstatement is now impractical, and he is no longer seeking it. Instead, he is seeking an award of so called "front pay" for ten years. ICF avers that if Mr. Singal is found to have been terminated for protected activity, he is only entitled to the "make whole" remedies of back pay and lost benefits.

Front pay is prospective relief which may be awarded instead of reinstatement in those cases where reinstatement is not appropriate. *See McCuiston v. Tennessee Valley Authority*, 89 ERA 6 (1991); *See, e.g., Blum v. Witco Chem. Corp.*, 829 F.2d 367, 373-374 (3d Cir. 1987) and *Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1331 (7th Cir. 1987), *vacated on other grounds*, 486 U.S. 1020 (1988) (reinstatement may be infeasible because of reductions in force). Front pay is an award for the reasonable future period required for the victim of discrimination to reestablish his rightful place in the job market. *Gross v. Exxon Office Sys. Co.*, 747 F.2d 885, 889 (3rd Cir. 1984). While it is recognized that computing an award for future damages is inherently speculative, it can not be unduly speculative. *Dunlap-McCuller v. Riese Organization*, 980 F.2d 153, 159 (2nd Cir. 1992), *cert. denied*, 114 S. Ct. 290 (1993). "[T]o the extent a front pay award is necessary to make a discrimination victim whole, it assumes that the former employee will find no other employment during the period for which front pay is offered." *Williams v. Pharmacia Opthalmics, Inc.*, 926 F.Supp. 791 (N.D. Ind. 1996).

Given that Mr. Singal was 58 when he was fired, and that his job search since has been essentially unsuccessful, I am convinced that he will require additional time to find employment. However I find a front pay award of 10 years to be excessive. But I conclude that he is entitled to two

years of front pay beginning November 14, 1999 at his regular annual salary rate. During these two years, Mr. Singal will also incur out-of-pocket expenses for health insurance premiums in the amount of $741 per month. He is therefore awarded a total of $17,784 in this category.

The ARB has held that future damages should be discounted to present value. However, because the end of the front pay period will be only several months hence, a reduction to present value does not seem appropriate. *See Michaud v. BSP Transport, Inc.*, 95-STA-29 (ARB Oct. 9, 1997). Thus, Mr. Singal is awarded front pay in the total amount of $89,784 ($72,000 + $17,784).

Compensatory Damages

Mr. Singal asks for of $110,000 in compensatory damages for anguish, pain and suffering caused by the loss of his professional reputation, diminished status as head of family and household and a providing father and husband, and an irreversible injury to his marriage. ICF contends that Mr. Singal has not proven any damages beyond those of lost wages since no medical evidence was offered. Prior cases have held that expert medical evidence is not necessary to award compensatory damages for emotional distress, and that a complainant's testimony alone is a sufficient basis for a finding that emotional distress is due to discrimination and award of damages. *See, e.g., Jones v. EG&G Defense Materials, Inc.*, ARB Case No. 97-129, ALJ Case No., 95-CAA-3 (ARB Sept. 29, 1998). Thus I conclude that the testimony of Mr. and Mrs. Singal, if credited, is sufficient to support an award of compensatory damages.

While there is no arbitrary upper limit on the amount of compensatory damages that may be awarded under federal employer protection statutes, the ARB has held that awards must be reasonable in comparison to awards in similar cases. *Leveille v. New York Air Nat'l Guard*, ARB No. 98-079, ALJ Nos. 94-TSC-3, slip op. at 6 (ARB Oct. 25, 1999). Until recently, claims for emotional distress unsupported by medical evidence did not exceed $50,000. In *Crow v. Noble Roman's, Inc.*, 1995-CAA-8 (Sec'y Feb. 26, 1996), complainant's testimony was that he was terminated without advance warning after working for ten years for the respondent; that he received food stamps for a period, and that he could not afford health insurance. That was sufficient to justify $10,000 in compensatory damages. The complainant in *Smith v. Esicorp, Inc.*, ARB No. 97-065, ALJ No. 93-ERA-16 (ARB Aug. 27, 1998), was awarded $20,000 even though he had not been fired from his job or suffered any financial loss. The testimony of the complainant and his wife showed that he suffered mental and emotional injury caused by the employer's posting of several derogatory cartoons mocking him. In *Jones v. EG & G Defense Materials, Inc.*, 1995-CAA-3 (ARB Sept. 29, 1998), the ARB affirmed a $50,000 award of compensatory damages for pain and suffering where complainant testified about his embarrassment in looking for a new job, his emotional turmoil, his panicked response to being unable to pay his debts, his embarrassment as neighbors witnessed the repossession of his car and customers witnessed the repossession of his truck from his appliance repair shop. Additional considerations included the loss of medical coverage which resulted in putting off a planned ear operation for the complainant's wife, complainant's inability to provide continuing financial support to two stepdaughters

who were attending college, and evidence of injury to complainant's credit rating.

The ARB has recently affirmed an award for compensatory damages in the amount of $250,000, even though complainant presented no expert medical or psychiatric testimony. *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001). The opinion acknowledged that the award was comparatively high, but noted that in Title VII cases, awards up to $300,000 for non-pecuniary losses are allowed. The facts which supported this award were complainant's continuing difficulty in finding work in his chosen profession, his emotional distress caused by his depleted finances, the repeated requests of friends and family for financial help, and the obligation to inform those responsible for his professional development that he had been fired.

Mr. Singal's credible testimony presented a picture generally similar to that in *Hobby*. He endured humiliation and embarrassment in the final days of his ICF employment. He was subjected to verbal abuse for his protected activity which he believes exacerbated his hypertension. His termination letter was given to him without warning, in the presence of at least one other person, and he was escorted out of the ICF premises by one of the group leaders in view of fellow workers. He was given only a very brief period to pick up his things in his office. He testified, in effect, and I find, that so public and unnecessary humiliation was particularly devastating to a man of mature years, who is rightfully proud of the fact that, although an immigrant from India, he secured an education which he views as equivalent to a Ph.D., and raised and educated several children to become doctors and a lawyer (his co-counsel in this case). I find that the sudden termination and the treatment of this gentleman in the twilight of his long, and by all indications honorable, career, as if he were caught in some gross impropriety or worse, was not only illegal, but the manner of the termination was unnecessarily harsh and humiliating. I find that the summary firing of this rightfully proud man who had successfully provided for his family for many years, put him in sudden financial straights, left him without medical insurance, and forced him to live on handouts from his children. He credibly testified that he is ashamed that he is no longer able to provide for his wife, that he lost dignity and status among his friends, and that this led to serious marital strife which may have permanent effects. I credit his testimony that his professional reputation has been irreparably damaged because he has to explain why he left ICF and his long unemployment. I also find that his employment prospects have been and will continue dimming as he gets older. In light of these considerations, I find that compensatory damages in the amount he prays for, i.e. $110,000, are appropriate.

However, Mr. Singal's prayer for $30,000 for the loss of his home is denied. While he said that he had to sell his home on account of his termination, he apparently sold it to one of his sons and he now lives rent-free in a house owned by another son. (TR3-162.) In as much as these inter-family arrangements appear not to have been arms length transactions, in the absence of other evidence showing that he lost his home as an unavoidable consequence of his firing, I feel compelled to conclude that Mr. Singal has failed to prove this item.

Exemplary Damages

The SDWA authorizes an award of exemplary damages "where appropriate." 42 U.S.C. §§ 300j-9(i)(2)(B)(ii). Cases have held that exemplary damages are appropriate where "the defendant's conduct involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983).

ICF's insidious misconduct in this case inflicted not only a private wrong on Mr. Singal, but also a public wrong on the nation. ICF had been entrusted by the U.S. government with the very vital task of monitoring the quality and accuracy of the work of many environmental laboratories engaged in the Superfund cleanup to protect our nation's sources of drinking water from toxic contamination. Because ICF undertook to be the government's watchdog of many laboratories, it's role was national in scope, and any violation of its contractual obligations could have a potentially national impact which could also be very long lasting. Because of the extreme importance and national scope of ICF's role, and because the failure of any link in the interlocking quality assurance chain envisioned in the SDWA could have disastrous consequences, ICF itself was expressly required to do its oversight work under the watchful eye of yet another watchdog of its own scientific operations to doubly ensure high quality and scientific integrity of the national cleanup endeavors. Although ICF obviously knew that it had a duty to ensure that its own watchdog had independence from those who were monitoring other laboratories, it violated the public trust reposed in it by failing to have such an independent watchdog. But what is worse, it deceived the government and the public by filing QAPPs and organizational charts falsely representing that it had an independent watchdog. The fact that it had a formal internal organization chart pursuant to which it ran its business (which was really the public's business), while at the same time offering to the public a contradictory chart which falsely represented what it was doing and thus concealing its dereliction, leaves me in no doubt that ICF was acting knowingly. The fact that it kept doing it for at least two years, is telling evidence that it was doing it willfully and deliberately. Thus I conclude that ICF knowingly, deliberately, and for a protracted period, engaged in a sham, not to say fraud on the public, which could have had (and perhaps did have) potentially disastrous and national consequences, which may not be known for years. It is clear to me that this conduct inherently involved "reckless or callous indifference to the federally protected rights of others," i.e. the general public. *Smith v. Wade*, Ibid at 56. And it should be noted that but for this whistleblower action, these derelictions would not have come to light. I therefore find this is an appropriate case for awarding exemplary damages.

Among the factors to be considered in arriving at the amount of exemplary damages are the harm likely to result from the defendant's conduct, the degree of reprehensibility of that conduct, its duration, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct. *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1127 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 734 (1995) (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22, 11 S.Ct. 1032, 1045-46 (1991)). Exemplary damages should also be in a sum calculated to deter others from similar misconduct. *Rowlett v. Anheuser-Busch, Inc.*, 832 F. 2d 194, 205 (1st Cir. 1987) (citing *Smith*, 461 U.S. at 53-54); *see also Johnson v. Old Dominion Security*, 1986-CAA-3 (Sec'y May 29, 1991). A careful consideration of these factors leads me to conclude that $250,000 is the minimal sum which would be even remotely commensurate with the gravity of ICF's misconduct in this case, and one which

may also deter others from endangering the nation's clean water supplies in a similar way. *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 705-06 (1st Cir. 1995).

ORDER

Respondent ICF Kaiser Engineers is hereby ordered:

1. To pay complainant Rajendar Kumar Singal back pay in the amount of $100,954.

2. To pay complainant Rajendar Kumar Singal for his lost medical benefits in the amount of $19,240.

3. To pay complainant Rajendar Kumar Singal prejudgment interest on back pay and medical benefits in the amount of $85,750

4. To pay complainant Rajendar Kumar Singal front pay in the amount of $72,000.

5. To pay complainant Rajendar Kumar Singal for future medical benefits in the amount of $17,784.

6. To pay complainant Rajendar Kumar Singal for lost retirement benefits in the amount to be determined by Mr. Singal and ICF Kaiser Engineers, Inc.

7. To pay complainant Rajendar Kumar Singal compensatory damages in the amount of $110,000.

8. To pay complainant Rajendar Kumar Singal exemplary damages in the amount of $250,000.

9. Complainant's counsel may file and serve a fee and cost petition within 5 days. Within 10 days thereafter, Respondent's counsel may file detailed objections to the fee petition. Complainant's counsel may reply to the objections within 5 days.

A
ALEXANDER KARST
Administrative Law Judge

AK:vc

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§ 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended

Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§§§ 24.7(d) and 24.8.